LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUL 3 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC., *Petitioner,*

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Respondent,*

—and—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SIMON H. RIFKIND
575 Madison Avenue
New York 22, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.
Attorneys for Respondent American Society of Composers, Authors and Publishers

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

CARL L. ZANGER
New York, N. Y.
Of Counsel

July 1, 1965

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
ASCAP	3
ASCAP's Licensing Activity under the Amended Final Judgment	4
ASCAP Licenses with Broadcasters	5
The Proceedings Below	6
Argument	9
Conclusion	15

CITATIONS

CASES:

Columbia Artists Management, Inc. v. *United States;* 33 U. S. L. Week 3374 (May 24, 1965)	14
Matter of Shenandoah Valley Broadcasting, Inc., 331 F. 2d 117 (2d Cir.), *cert. denied,* 377 U. S. 997 (1964)	13
Minnesota Mining and Mfg. Co. v. *New Jersey Wood Finishing Co.,* 33 U. S. L. Week 4481 (May 24, 1965)	12

PAGE

United States v. *American Society of Composers, Authors and Publishers*, S.D.N.Y., Civ. No. 13-95 4

STATUTES:

Expediting Act, § 2, 15 U. S. C. § 29 2

28 U. S. C. § 1254(1) 2

RULES:

Rule 71, Federal Rules of Civil Procedure 9, 10, 11

Rule 21(3), United States Supreme Court Rules .. 1

MISCELLANEOUS:

Statistical Abstract of the United States (1964) .. 11

Census of Business (1958) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

METROMEDIA, INC.,
Petitioner,
—*against*—
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Respondent,
—and—
UNITED STATES OF AMERICA

No. 211

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent American Society of Composers, Authors and Publishers ("ASCAP") submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below

The United States District Court for the Southern District of New York did not render a reported opinion. The Court's opinion delivered orally at the time of argument of petitioner's motion is part of the record filed in this Court (R., Vol. II, pp. 13a-14a).*

*Page references with the prefix "R" are to the Appendices of the parties filed with the Court of Appeals and transmitted to this Court by petitioner pursuant to Rule 21(3) of this Court's Rules.

The judgment of the District Court, dated and filed March 25, 1964, provides as follows:

> "Motion denied. See record and transcript of proceedings; so ordered."

The opinion of the Court of Appeals for the Second Circuit is reported in 341 F. 2d 1003 (1965).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1).

Petitioner, relying on § 2, Expediting Act, 15 U. S. C. § 29, has also filed a notice of appeal to this Court from the order and judgment of the District Court. Concurrently with its petition for a writ of certiorari, petitioner has filed a jurisdictional statement in this Court.

Respondent's motion to dismiss petitioner's appeal or, in the alternative, to affirm the judgment of the District Court, is being filed in this Court concurrently with the filing of respondent's brief in opposition to the granting of the petition for a writ of certiorari.

Questions Presented

The narrow questions presented by the petition are:

a) whether petitioner, although not a party to this action, and having refused to resort to the procedures expressly made available to it under the Amended Final Judgment in this action, has standing to move to have respondent punished for contempt; if, and only if this question is answered affirmatively, then the further question arises:

b) whether respondent failed to comply with the directives of Section IX of the Amended Final Judgment when it failed to quote a license fee to petitioner for the peculiar type of license devised by the ingenuity or whim of petitioner.

Statement

ASCAP

ASCAP is an unincorporated membership association organized under the laws of the State of New York with over 9,000 composer, author and publisher members, each of whom grant to ASCAP the non-exclusive right to license non-dramatic public performances for profit of the compositions written, composed or published by such members during the term of their membership in ASCAP.

ASCAP licenses many thousands of users of music throughout the United States, ranging from three national television networks to hotels and restaurants employing music.

ASCAP performs a virtually indispensable service both for its members and for the users of the members' music. By dealing with ASCAP, the user may avoid the necessity (which would frequently be the impossibility) of dealing with a separate copyright proprietor for each composition performed. And by belonging to ASCAP, the individual members are spared what would be the impossible task of attempting to discover and prosecute infringments of their music by radio stations, television stations, restaurants, taverns and myriad other users all over the United States and to negotiate appropriate license agreements with such users.

The opinion of the Court of Appeals in this case noted that (341 F. 2d at 1005)

> "In exchange for non-exclusive rights to its members' works, ASCAP licenses them for public performance, collects and distributes the royalties, and maintains a continuous surveillance over the myriad of music users for possible infringements. ASCAP has risen to a position of vital importance to the thousands of such copyright proprietors who would otherwise be unable to check performances of their compositions. . . ."

ASCAP's Licensing Activity under the Amended Final Judgment

The most important fact about ASCAP's licensing activity is that it is regulated and controlled in virtually every detail by the Amended Final Judgment entered in this antitrust action on March 14, 1950 on the consent of the parties (*United States* v. *American Society of Composers, Authors and Publishers,* S.D.N.Y., Civ. No. 13-95).

The central theme of the Amended Final Judgment is that it guarantees any user the right to perform ASCAP music and guarantees further that he will pay no more than a fair license fee.

Under Section IX of the Amended Final Judgment

> "(A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested." (R., Vol. I, p. 11a).

If the parties are unable to agree upon a reasonable fee within sixty days from the date when the application is received

> "the applicant therefor may forthwith apply to [the United States District Court for the Southern District of New York] for the determination of a reasonable fee." (R., Vol. I., p. 11a).

In any such proceeding, the burden is on ASCAP to establish the reasonableness of the fee which it has requested (R., Vol. I, p. 11a).

Once a reasonable fee has been finally determined by the Court, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP (Section IX [C], R., Vol. I, pp. 12a-13a). And even without a Court order fixing a fair rate, ASCAP is forbidden at all times to discriminate "in license fees or other terms and conditions between licensees similarly situated" (Section IV [C], R., Vol. I, pp. 4a-5a).

ASCAP has the right to urge the Court to fix the fee requested by it, but it has the burden of establishing the reasonableness of the fee it seeks.

The task of listening to the contentions of the parties and of arriving at a determination of a reasonable fee is committed by the Amended Final Judgment to the District Court.

ASCAP Licenses with Broadcasters

For many years, ASCAP licenses with broadcasters have had the license fee expressed as a percentage of a rate base, as defined by the license agreement. Both aspects of the fee—the percentage and the rate base—have undergone change in recent years as the result of negotiations between

ASCAP and the broadcasters in the course of Section IX proceedings commenced by the broadcasters, and concluded with the aid of the District Court.

The changes in the rate structure of the blanket license agreements between ASCAP and local radio stations were not, as can readily be appreciated, changes dictated by ASCAP. They were changes which resulted from long and vigorous negotiations between the parties concerned, aided by the Court in which rate proceedings have been pending.*

ASCAP is not presently dictating to radio broadcasters the terms of new licenses. In the District Court, there are now pending seven separate proceedings commenced by radio networks and by more than 1400 local radio stations for the determination of reasonable license fees under the Amended Final Judgment. If the parties to these proceedings fail to agree on the terms of new licenses, the District Court stands ready to make a determination of the reasonable license fees to be paid by the broadcasters.

Petitioner has not commenced any such proceeding, although it has an undisputed right to do so.

The Proceedings Below

Petitioner holds licenses from the Federal Communications Commission for 10 local radio stations.

On December 23, 1963, petitioner purported to exercise its initial rights under Section IX of the Amended Final Judgment by applying to respondent for blanket licenses for petitioner's local stations (R., Vol. I, pp. 63a-65a).

---

*For example, in the blanket license agreements between ASCAP and local radio stations which expired at the end of 1963, the commercial fee was 2⅛% (as compared to 2¼% under the prior agreements) of a rate base which expressly permitted deduction for certain programming and production costs (as compared to a rate base in the prior agreements which did not expressly permit such deductions).

Petitioner's application, however, was more than "an application for the right of public performance of any, some or all" of the compositions in the ASCAP repertory. Instead of the general application contemplated by Section IX, petitioner proposed a license tailored to meet its own peculiar desires:

> (a) With regard to the license fee, petitioner took the initiative from ASCAP and proposed that the fee be calculated in a substantially different manner than in any previous ASCAP blanket license with local radio stations;* and
>
> (b) Petitioner also demanded its own unique form of reporting requirements.**

Having thus drawn up its own license form, petitioner left ASCAP only the right to quote (and demanded that ASCAP quote) the percentage figures to be applied to the new and unique scheme devised by petitioner (R., Vol. I, pp. 63a-65a).

---

*Under the local station blanket radio licenses which expired December 31, 1963, the broadcaster paid, as a commercial fee, 2.125% of its "net receipts from sponsors after deductions," as those words were defined at length (R., Vol. I, pp. 39a-43a). Under petitioner's scheme, the license fee would be paid on the basis of "gross receipts" instead of "net receipts from sponsors after deductions" and, in the event that gross receipts in any license year exceeded gross receipts for a base year (1962), the percentage royalties payable on the excess would be less. However, even under petitioner's proposed "gross receipts" formula, there would be deductions for rate card discounts and bad debts. Thus petitioner demanded its own idiosyncratic rate base.

**For example, as to reports of music played on the licensee's radio station, petitioner would require ASCAP to give two weeks' advance notice of each period for which it wished a report. And reports to ASCAP showing the license fees due were to be keyed to the Annual Financial Report form required of radio stations by the Federal Communications Commission.

Petitioner's application did not request ASCAP to quote "the fee which it deem[ed] reasonable" for its right "of public performance of any, some or all" of the compositions in the ASCAP repertory (Sec. IX [A]) (R., Vol. I, p. 11a). Rather, petitioner asked ASCAP to quote one component part of the license fee—the percentage—while petitioner purported unilaterally to determine the other principal component of the fee, the rate base, and also all other terms and conditions of the license.

ASCAP did not comply with petitioner's demand. But ASCAP did advise petitioner—as it advised all other local stations which applied for licenses—of the fee which it deemed reasonable for a local station blanket license.

Petitioner made no attempt to negotiate with ASCAP. Nor did it institute a rate proceeding under Section IX of the Amended Final Judgment. Instead, it demanded that the Government institute contempt proceedings against ASCAP for an asserted failure to comply with Section IX (R., Vol. I, pp. 84a-88a). Upon the Government's refusal to do so (R., Vol. I, pp. 89a-90a), petitioner commenced the present proceedings in the District Court, seeking to punish ASCAP for contempt on the ground that ASCAP had failed to comply with the requirements of Section IX that it quote a license fee.

Chief Judge Ryan, who has had nine years of experience in administering the Amended Final Judgment, denied petitioner's motion. He held that petitioner lacked standing to move to have ASCAP punished for contempt (R., Vol. II, p. 13a). He also denied the motion on the merits, saying:

> "I also feel that you have no right to dictate or attempt to dictate arbitrarily the basis upon which your fee should be computed. In other words, as part of your license, I don't think any applicant has

> a right to say that the fee should be computed either on the net or the gross returns or receipts. That is a matter which you could urge on a hearing for fixation of reasonable fees after ASCAP has told you the basis on which they will grant you a license.
>
> "I think the most you can do here is to ask for a blanket license, and then on return of their offer you can ask for a hearing and urge, as you do now, that fixing it on the basis of net receipts is manifestly unjust and discriminatory and violates section 8 of the decree.
>
> "I think your application here to punish for contempt must be denied." (R., Vol. II, p. 14a).

A unanimous Court of Appeals for the Second Circuit affirmed Chief Judge Ryan's decision; the Court held that (341 F. 2d at 1005)

> "the appeal is properly before us, that Metromedia has no standing to bring the contempt action, and that even if standing existed, Metromedia's claims do not establish any violation of the terms of the decree. . . ."

Argument

The decision below is clearly correct. Moreover, it neither involved nor turned on any significant question of federal law that should be decided by this Court. Petitioner has failed to show any special and important reason for granting its petition for a writ of certiorari to review the decision below. Accordingly, the petition should be denied.

I.

Petitioner relies here—as it relied below—on Rule 71, F. R. Civ. Pr., as authority for its standing to move to

have ASCAP punished for contempt. Petitioner suggests that this case raises the question of the proper interpretation of Rule 71.

Rule 71 provides in pertinent part:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party. . . ."

The Court of Appeals held that petitioner was not a person in whose favor the Amended Final Judgment had been made. The Court said (341 F. 2d at 1008):

> "Here, no order was made in Metromedia's favor. No monetary or other relief was specifically granted to Metromedia—it was not even named in the judgment—and it is not enough to say that Metromedia was indirectly or economically benefitted by the decree. See United States v. Paramount Pictures, Inc., 75 F. Supp. 1002 (S. D. N. Y. 1948). The judgment is in favor of the United States alone."

The decision of the Court of Appeals is clearly correct and raises no significant question concerning the proper interpretation of Rule 71. Petitioner has cited no authority —and we know of none—which suggests or even implies that Rule 71 is applicable to the unique situation existing here under the Amended Final Judgment. The Amended Final Judgment is not an ordinary order or judgment of the Court. It is a unique quasi-legislative document which regulates ASCAP's licensing activities in virtually every detail. By virtue of Section IX, countless thousands of would-be users of ASCAP music are granted an absolute

right to a license and the right to have the District Court determine a reasonable license fee.*

Rule 71 was never intended to apply to this kind of situation. Surely, each one of the thousands of would-be users of ASCAP music does not have the right to ignore the procedures expressly made available to private parties and to move to have ASCAP punished for contempt any time he believes himself aggrieved. And surely this must be true when the Government—the plaintiff in this action—finds no basis for instituting contempt proceedings.

The Court of Appeals explicitly recognized the desirability of leaving the choice and power to enforce the Amended Final Judgment in the hands of the Government. The Court said (341 F. 2d at 1008):

> "It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection for their rights. The government has not been blind to the needs of the individual members of the music industry; as already noted, the original judgment against ASCAP has been modified from time to time to meet changing conditions."

Particularly is the result reached by the Court of Appeals sound where the Amended Final Judgment grants a remedy to would-be users of ASCAP music—the right to apply under Section IX to the District Court for deter-

---

*According to *Statistical Abstract of the United States* (1964), there are 29,203 hotels, 2,754 skating rinks and 875 dance halls in the United States (Table #1192, p. 838). According to *Census of Business* (1958), there are 344,740 eating and drinking places in the United States (Table I, pp. 1-5). All are potential users of ASCAP's music as is each and every radio and television station in the United States.

mination of a reasonable license fee. Both Chief Judge Ryan and the Court of Appeals recognized that a denial of petitioner's motion did not leave petitioner remediless.

It is precisely because petitioner has an explicit remedy under Section IX of the Amended Final Judgment that this case does *not* raise the issue of the denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions. The only right that has been denied to petitioner by the decision below is the right to use a contempt proceeding to compel ASCAP to capitulate *ab initio* to petitioner's demands for a unique kind of local station blanket license devised to suit the particular whim of this petitioner.

Petitioner's reliance on this Court's decision in *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 33 U. S. L. Week 4481 (May 24, 1965) is misplaced. The issue there was whether a proceeding instituted before the Federal Trade Commission tolled the running of the statute of limitations under the Clayton Act for private treble-damage antitrust actions. That case had nothing to do with the rights of private persons to utilize contempt proceedings to enforce civil antitrust decrees to which they were not parties.

The holdings of the two courts below were both based on the same, narrowly delineated ground—that in the circumstances of the carefully drawn, very specialized and carefully administered decree here involved, petitioner, a non-party to that decree, had no right to ignore the procedures expressly made available to it and to resort to contempt proceedings. There is, we submit, no reason for further review of these holdings.

II.

Petitioner argues that the decision of the Court of Appeals construed the Amended Final Judgment so as to authorize a continuing violation of the antitrust laws be-

cause, in petitioner's view, it permits ASCAP to force a standard form of license on all users of music.

Petitioner's argument is without merit. The fact is that petitioner seeks in this proceeding to compel ASCAP to capitulate, without the benefit of a Section IX proceeding, to petitioner's proposal for a new rate base in a local station blanket license. Petitioner seeks in this way to bypass the procedures set forth in Section IX of the Amended Final Judgment for the determination of a reasonable license fee.

The essence of petitioner's argument is that, under the Amended Final Judgment, the licensee has the right to compel ASCAP to accept a license form tailored to the licensee's peculiar desires. No matter what form of license the applicant may contrive, says petitioner, ASCAP is required to quote a fee for that form of license. Thus, petitioner can devise its own rate base, every other radio station owner can devise his own rate base and every tavern owner can devise his own rate base. And, says petitioner, ASCAP must quote a different fee for every user and grant every user his own special license. The number of combinations and permutations defies imagination; surely ASCAP could never sustain the burden of establishing the reasonableness of its rates among users similarly situated and resist a charge of discrimination among such users.

Nothing in the Amended Final Judgment—let alone in logic or common sense—requires such a ludicrous result. See *Matter of Shenandoah Valley Broadcasting, Inc.*, 331 F. 2d 117 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964). Under Section IX, ASCAP has the right and the obligation to quote a license fee—ASCAP cannot be restricted to the peculiar method of computation and reporting requested by each of the many applicants for a license. Moreover, if the District Court has the power to adjudicate a reasonable license fee when the parties cannot agree, then surely

petitioner does not have the right to impose on ASCAP and the Court its personal method of computing fees.

The Court of Appeals held that (341 F. 2d at 1009)

> ". . . Metromedia has no right conclusively to determine certain elements of the 'fee' and then to require ASCAP, under pain of contempt, to quote a matching percentage figure. On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate. .Thus far, it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree."

Petitioner's own discussion of *Columbia Artists Management, Inc.* v. *United States,* 33 U. S. L. Week 3374 (May 24, 1965) shows that the case is irrelevant here. There the District Court, addressing itself to the substance of the claimed anti-trust violation, refused to sanction a per se violation of the Sherman Act, merely because the violation allegedly conformed to a consent decree. Here, the District Court has not passed on the substance of petitioner's claim, but has properly ruled that orderly procedure requires that the claim be considered in the context of a Section IX proceeding.

We fail to see how a continuing violation of the anti-trust laws is authorized when petitioner remains free to pursue the procedures of Section IX and to present to the Court all of the arguments presented in support of the unusual proceeding which petitioner has resorted to.

Once ASCAP has supported its burden of establishing the reasonableness of the fee requested by it and a reasonable fee has been determined pursuant to Section IX, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated. There is no re-

quirement that such other applicants accept the licenses offered, and each applicant remains free to initiate its own proceeding for the determination of a reasonable fee as provided in Section IX.

We submit that the petition here does not bring to this Court any important federal question. All that is involved is petitioner's refusal to resort to the procedures set forth in a carefully worked out and carefully administered decree as it relates to a would-be user of ASCAP's repertory.

Conclusion

This case presents very narrow and particularized issues that are not of general public importance warranting the consideration of this Court. The decision below was correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON H. RIFKIND
575 Madison Avenue
New York 22, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.

Attorneys for Respondent
American Society of Composers,
Authors and Publishers

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

CARL L. ZANGER
New York, N. Y.
Of Counsel

July 1, 1965